MEMORANDUM

Re: Recovery of Response Costs for a Failed Remedy

To: Allyn Stern
Assistant Regional Counsel

From: Chris Valente
Law Clerk

ISSUE

Whether the U.S. can recover the costs of a remedial action employing a new on-site technology which, despite testing and reasonable efforts by EPA, inexplicably failed.

FACTS

At the site in question, Schaffer Electric, the soil was contaminated by PCB's. EPA could either have performed a removal and incineration of the contaminated soil or it could have employed a newer in-soil technology which would have eliminated the necessity of removing the soil first. The site was deemed a particularly good one to utilize the new technology, which EPA thought to be preferable because it would have been the more permanent and cost-effective remedy. EPA performed a patch test on the property and the remedial method worked as hoped. Then EPA proceeded to treat the entire site in the same fashion. For reasons which remain unknown, the remedial technology did not work as planned.

EPA then had to perform a removal incurring greater costs than anticipated. The potentially liable parties are contesting EPA's right to recover those response costs which EPA incurred in employing the failed remedial action on the grounds that such response costs are inconsistent with the National Contingency Plan.

DISCUSSION

Overview

Section 107 of CERCLA permits the government to recover response costs not inconsistent with the national contingency plan. Those sections of the updated NCP which may be relevant to the failed remedy situation appear at 40 C.F.R. 300-.61 to .70. See National Contingency Plan Requirements, infra. Section 121 Cleanup Standards, while not having any direct bearing on section 107 liability, may be useful in ascertaining what standards Congress intended that the NCP would evince, since section 105 mandates that the NCP be drawn up to reflect and effectuate the responsibilities and powers created by CERCLA.

The courts have interpreted section 107's "not inconsistent" language to mean that the defendant has the burden of proof, when a government entity brings a cost recovery action, to demonstrate the extent to which the government's response actions have been inconsistent with the NCP, in order to escape liability for costs associated with those actions. See Burden of Proof, infra.

The scope of review for a determination of whether the response methods chosen by EPA or another governmental entity is not inconsistent with the NCP is review on the administrative record, to be supplemented only in narrowly defined circumstances. See Scope of Review, infra. Section 113 provisions are applicable. Review on the record has been found to be constitutional as well.

The standard of review which the reviewing court will employ is whether the EPA's choice of response-method was arbitrary and capricious. See Standard of Review, infra. Courts have found section 113's judicial review provisions to be applicable to the agency's choice of cleanup methods in a cost recovery action. The court will not substitute its own judgement but will defer to the agency's scientific expertise; the choice of cleanup methods is viewed as a decision within the agency's discretion. There is also a strong indication that the court will analyze the agency's actions from the point in time at which the agency undertook the response action and will not permit argument which utilizes the benefit of hindsight.

There are policy arguments both for permitting and for denying recovery of costs for a failed remedy. A brief synopsis of possible policy arguments appears at the end of this memo under Policy.

National Contingency Plan Requirement

The NCP Itself

General NCP guidelines dictate that in undertaking Fund-financed action, EPA (the lead agency) must, among other things, "rely on established technology, but also consider alternative and innovative technology when feasible and cost-effective." 40 C.F.R. 300.61. Thus the NCP may evince a minor preference for established technologies, but it is doubtful that one challenging costs incurred by the government as being inconsistent with the NCP can rely solely on that preference since the NCP at the same time sanctions the use of newer technologies and, indeed, requires their consideration.

Section 300.68 deals specifically with remedial action. During the initial screening of alternatives phase, governed by 300.68(g), EPA must consider 1.) cost, 2.) acceptable engineering practices, and 3.) effectiveness. EPA can show that it considered costs by showing that the remedy would have been cost-effective had it worked, as EPA reasonably believed it would. Likewise, the remedy would effectively have contributed to the protection of public health and welfare and the environment, thus eliminating the effectiveness consideration.

With respect to acceptable engineering practices under section 300.68(g), the alternatives to be considered must be feasible for the location and conditions of the release, applicable to the problem, and a reliable means of addressing the problem. It was thought at the time that the remedy was chosen that the on site remedy was particularly suited to the site, conditions of the release, and type of problem. To demonstrate that EPA properly considered reliability may be more difficult, since the technology which EPA employed was an innovative one. However, EPA did perform a patch test in which the remedy worked as it was supposed to, in other words, reliably.

EPA must consider innovative or advanced technologies in addition to established ones during the process by which it chooses a remedial method under the NCP. During the detailed analysis of alternatives phase, 300.68(h), "the detailed analysis of each alternative shall, as appropriate, include:

(i) Refinement and specification of alternatives in detail, with emphasis on the use of established technology. Innovative or advanced technology shall, as appropriate, be **evaluated as an alternative to conventional technology;**

. . .

(v) an analysis of whether . . . other advanced, innovative, or alternative technologies is appropriate to

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reliably minimize present or future threats, etc . . ." Obviously, the NCP mandates consideration and analysis of these technologies with the expectation that in some cases at least, they they will chosen over established technologies.

The selection of remedy phase, 300.68(i) says the "appropriate extent of remedy shall be determined by the lead agency's selection of a cost-effective remedial alternative that effectively mitigates and minimizes threats to and provides adequate protection of public health and welfare and the environment." This section could arguably be interpreted as meaning that the appropriateness of the remedy is not demonstated until it has been shown that the remedy has effectively mitigated and minimized threats, etc. However, because the section is captioned "Selection of Remedy" and thus mandates how the agency should select a remedial alternative, a better interpretation is that the agency determines the appropriate extent of remedy at the time when it selects what it believes to be the cost-effective remedial alternative that effectively mitigates and minimizes threats, etc., after having considered the other options according to the NCP..

The NCP also lists possible appropriate remedial actions, very generally in 40 C.F.R 300.68(j) and more specifically in 300.70 - Methods of remedying releases. Section 300.70 lists separately on-site and off-site actions, without expressing a general preference. Under 300.70(b) Engineering Methods for On-Site Actions, paragraph (iii) states that "in some cases where it can be shown to be cost-effective, contaminated sediments and soils will be treated on the site." It is unclear when such a demonstration must be made to defend against charges of inconsistency with the NCP. Before it undertook the on-site method, EPA rationally believed it to be more cost-effective than removal.

In outlining off-site methods of remedying releases, the NCP says off-site transport or storage, treatment, destruction, etc. "may be provided in cases where EPA determines that such actions: (i) Are more cost-effective than other forms of remedial actions . . ," or fall into other categories not applicable to the present problem. Thus, when EPA rationally, but wrongly, determined that off-site incineration was not more cost-effective than on-site remedial action, its decision to attempt the on-site treatment method instead of removing the contaminated soil was correct under 300.70 of the NCP.

These sections demonstrate that the NCP's approach towards the use of newer technologies is cautious but by no means prohibitory. At least one court has observed that "the NCP allows the EPA broad discretion in determining the appropriate remedial action. U.S. v. Ward, 618 F.Supp. 884,

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900 (D.C.N.C. 1985). Given that 1.) innovative technologies are to be considered at each phase under the NCP, 2) off-site remedies are to be chosen only where EPA determines that such actions are more cost-effective (or fall into other inapplicable categories), 3.) innovative technologies are not as likely to work as planned precisely because they are new and relatively untried, and 4.) EPA did test the new technology on-site, complying with the investigation and analysis which the NCP mandates in the remedy selection process, then EPA has a good argument that the employment of the new on-site technology in this case was neither facially nor philosophically inconsistent with the NCP.

Section 121 Cleanup Standards

(To be completed later if you wish.)

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Burden of Proof

Courts have consistently held that the burden of proving inconsistency with the NCP in a government cost recovery action lies with the party who seeks to contest the costs. U. S. v. Northeastern Pharmecutical and Chemical Company [NEPACCO], 810 F.2d 726, 17 ELR 20603, 25 ERC 14--, 1403 (8th Cir. 1986) (the statutory language and the statutory scheme establish the allocation of the burden of proof of inconsistency upon the defendants when the government seeks to recover its costs); U.S. v. Ward, 618 F.Supp. 884, 899 (D.C.N.C. 1985); U.S. v. Northernaire Plating, No. G84-1113, Western District of Michigan, slip. op. at 9 (May? --, 1988); O'Neil v. Picillo, 682 F. Supp. 706, 728 (D.R.I. 1988) New York v. General Electric, 592 F. Supp. 291, 304 (N.D.N.Y. 1984); Such a presumption of consistency is in accord with the general principle that the actions of public officers are presumed to be regular. Ward, 618 F.Supp. at 899, quoting Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971). The Ward court also found that it would be an "unreasonable waste of judicial time and government resources, not to mention an usurpation of agency authority, to require the EPA to justify its every action" in order to recover its costs. Id. at 900.

Defendants must show more than variance with the NCP; they must also show that the cleanup, as a result of such variance, resulted in demonstrable excess costs for which they should not be responsible. Picillo, 682 F.Supp. at 729.

Costs not inconsistent with the NCP are conclusively presumed reasonable and therefore recoverable. NEPACCO, 25 ERC at 1403; U.S. v. Vertac Chemical Corp., 671 F.Supp. 595, 613 (E.D. Ark. 1987) .

Scope of Review

Courts have uniformly held, with or without the benefit of section 113's judicial review provisions, that the scope of review of the EPA' choice of remedial method -- because it is decision delegated to the agency -- is limited to review on the administrative record, at least absent exceptional circumstances. E.g., Nicolet, 17 ELR at 21092 , citing Camp v. Pitts, 411 U.S. 138,142 (1973) and Florida Power and Light Co. v. Lorion, 105 S.Ct. 1598 (19--) (an administrative agency's action is to be reviewed on the administrative record); U.S. v. Seymour Recycling, 26 ERC 1559, 1561 (S.D. Ill. 1987). The Nicolet court, which found the SARA amendments applicable to pending cases, stated that " the case law and the statutes make it clear that the court is to confine its review of the EPA action to the administrative record." 17 EPR at 21092. Accord, Seymour, 26 ERC at 1561 ("the plain language of Section 113 of CERCLA as amended by SARA requires the conclusion that judicial review of EPA's remedy decision in CERCLA cases be based on the administrative record applying the arbitrary and capricious standard.")

Review on the record means that the reviewing court cannot supply alternative reasons for agency action, nor can it attack or support the agency action with new evidence. Nicolet, 17 ELR at 21092, citing Dry Color Manufacturers' Association, Inc. v. Department of Labor, 486 F.2d 98, 104 n.8 (3d Cir. 1973). Thus, while the defendant can contest the sufficiency of EPA's reasons for utilizing the remedial technology at the time, it cannot present evidence not already part of the record to demonstrate that EPA's choice was not optimal. As the Nicolet court said, "[n]either the government nor [the defendant] is permitted to present post hoc rationlizations concerning the decision to take action at the . . . site." 17 ELR at 21092.

It is only if there are major deficiencies in the administrative record outlining the agency's decision to utilize a particular cleanup method that a court might remand the case to the agency for development of the factual record, as the court did in Rohm and Haas, or hold a de novo hearing. The court should not look to evidence outside the record where the agency has followed the guidelines in section 113 and corresponding regulations, or otherwise contemporaneously compiled a record which discloses the factors it considered in making its decision, unless it has acted improperly or in bad faith. See Rohm and Haas and Nicolet for discussions of the circumstances in which the reviewing court might, under administrative law principles, cause the administrative record to be supplemented.

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Scope of Review (cont.)

Section 113

Section 113 (k) mandates that the President provide for the participation of interested persons in the development of the administrative record on which judicial review of remedial actions will be based. Judicial review concerning the adequacy of any response is to be limited to the administrative record. 42 U.S.C. 9613(j). The statute specifically instructs the court to look to applicable principles of administrative law (see above) for those circumstances in which it may consider supplemental evidence.

Constitutionality

Review on the record in a government cost recovery action is constitutional and does not deprive the defendants of due process. E.g., U.S. v. Rohm and Haas Co., Inc. 669 F.Supp. 672, 679 (D.N.J. 1987), citing Lone Pine Steering Committee v. EPA, 777 F.2d 882 (3d Cir. 1982)

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Standard of Review

Section 113 mandates that "the court shall uphold the President's decision in selecting the response action unless the objecting party can demonstrate, on the administrative record, that the decision was arbitrary and capricious or otherwise not in accordance with law." 42 U.S.C. 113(j). The courts have held section 113 to be the applicable standard of review for cost recovery actions, even if the case was pending at the time of SARA's enactment. Nicolet, 17 ELR at 21092; Seymour, 26 ERC at 1561. Moreover, courts which have not relied solely upon section 113 have found the same arbitrary and capricous standard under traditional administrative law principles. Northernaire, slip. op. at 9; NEPACCO, 25 ERC at 1404; Ward, 618 F.Supp. at 900; Vertac, 671 F.Supp. at 614. Thus when a defendant contests the costs of a cleanup, it can meet the burden of showing inconsistency under the NCP only by successfully characterizing EPA's decision to incur that cost, or EPA's discharge of its duties under the NCP, as arbitrary and capricious. Northernaire; Ward.

The arbitrary and capricious standard is a narrow one, although it "does not shield the agency's action from a thorough, probing and in-depth review." Nicolet, 17 ELR at 21092. Many courts have explicitly recognized that remedial decisions involve specialized knowledge and expertise which the agency alone possesses and that the choice of a remedial method is a matter within EPA discretion. NEPACCO, 25 ERC at 1404; Ward, 618 F.Supp. at 900. Likewise, the courts are quite loath to substitute their lay judgement for that of agency professionals; evidence weighing is to be left to the agency empowered to make the decision, which decision is entitled to great deference. Nicolet, 17 ELR at 21092, Ward, 618 F.Supp at 900.

In Ward for instance, EPA chose incineration of PCB-contaminated soil instead of in-soil treatment advocated by the defendants. In upholding EPA's choice of remedial method, the court merely noted that the method advanced by the defendants had siginificant problems and that EPA regulations precluded its use. Thus, the court was willing to cite to EPA regulations to uphold an EPA decision. Likewise, in Northernaire, the court upheld the agency's decision to forego competitive bidding based on the agency's finding that an imminent and substantial, though concededly not an emergency, threat to the public health and welfare rendered inadvisable the use of the lengthy competitive bidding process.

Policy

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RE: Previous memorandum on a Failed Remedy's Consistency With the NCP

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FROM: Chris Valente
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During the time since I worked on the memo on NCP consistency and the failed remedy, I have come across a couple of cites in a CERCLA outline which might be useful and which I shall be happy to incorporate into the memo should you wish it.

The cases are as follows:

J.V. Peters & Co. v. EPA, 767 F.2d 263 (6th Cir. 1985) (remedies must be cost-effective to be consistent with the NCP)

NL Industries, Inc. v. Kaplan, 792 F.2d 896 (9th Cir. 1986) (strict compliance with the NCP is not required to overcome charge of inconsistency)

I have not yet looked at the cases myself. Please let me know if you would like me to get them for you.